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UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF NEVADA

DENNIS MONTGOMERY, an individual; and
MONTGOMERY FAMILY TRUST, a California
Trust,

Plaintiffs,

vs.

ETREPPID TECHNOLOGIES, L.L.C., a Nevada
Limited Liability Company; WARREN TREPP,
an individual; DEPARTMENT OF DEFENSE of
the UNITED STATES OF AMERICA; and
DOES 1 through 10,

Defendants.

AND RELATED CASE(S)

Case No. 3:06-CV-00056-PMP-VPC
Base File

3:06-CV-00145-PMP-VPC

**ETREPPID TECHNOLOGIES, L.L.C.
AND WARREN TREPP'S
OPPOSITION TO THE
MONTGOMERY PARTIES' MOTION
FOR AN EVIDENTIARY HEARING
AND MOTION FOR A PROTECTIVE
ORDER PENDING THE HOLDING OF
AN EVIDENTIARY HEARING**

eTreppid Technologies, L.L.C. and Warren Trepp (hereinafter collectively referred to as
"eTreppid"), by and through their counsel Hale Lane Peek Dennison and Howard, hereby submit their
Opposition to The Montgomery Parties' Motion for an Evidentiary Hearing and Motion for A
Protective Order Pending the Holding of an Evidentiary Hearing ("Montgomery's Motions").

1 **I. INTRODUCTION**

2 In the present motion, Montgomery requests that this Court relieve him of his obligations to
3 provide certain discovery, to eTreppid – including forensic images of hard drives, photocopies of the
4 faces of certain CDs, and copies the data stored on CDs bearing the eTreppid logo – based on nothing
5 more than Montgomery’s fantastic allegation that eTreppid caused FBI Special Agent Michael West to
6 plant evidence in the items that were seized during the FBI’s search of Montgomery’s home and
7 storage units, and which were subsequently returned to Montgomery.

8 This motion is just the most recent in a series of attempts by Montgomery to prevent eTreppid
9 from taking discovery in this matter. Since eTreppid requested the subject information in Its Second
10 Set of Requests for Production of Documents, served on November 19, 2007, Montgomery has simply
11 refused to participate meaningfully in discovery. Even after February 21, 2008, when this Court
12 ordered Montgomery to provide the requested information, Montgomery has attempted to avoid
13 production, first by filing an objection and motion for reconsideration of the Magistrate’s February 21,
14 2008 order, and, when that motion was denied, by simply refusing to provide the subject documents.
15 Now, six weeks after this Court ordered Montgomery to produce the subject documents, Montgomery
16 claims that he cannot do so because certain discrepancies exist between the original search warrant
17 returns (the “Returns”) and the inventory of returned items (the “Inventory”) prepared by the FBI.

18 Montgomery has been aware of the alleged discrepancies between the Returns and the
19 Inventory since approximately March 29, 2007, when the Inventory was completed and his former
20 counsel, Eric Pulver, signed for receipt of the document. Nonetheless, Montgomery did not ask this
21 Court to take any action regarding this matter until now, more than one year after he became aware of
22 the issue. Indeed, Montgomery did not even raise the alleged discrepancy between the Returns and the
23 Inventory as an objection to eTreppid’s Requests for Production, nor did he assert this issue as a
24 defense to eTreppid’s motion to compel. He should not be allowed to avoid production, at this late
25 hour, based on an argument that he could have brought to the Court’s attention months earlier.

26 This motion is not only untimely, but it is factually meritless. The alleged “discrepancies”
27 between the Returns and the Inventory consist of nothing more than 2 CDs and a handful of hard
28 drives. Montgomery acknowledges, in his motion, that these discrepancies may be explained by “an

1 omission made in the heat of the search.” Nonetheless, Montgomery invites this Court to indulge in a
2 conspiracy theory to explain the alleged discrepancy, but does not provide any real evidence of such a
3 conspiracy.

4 Finally, even assuming, *arguendo*, that there were some merit to Montgomery’s putative
5 suspicion that the evidence seized by the FBI was tampered with, this does not provide any basis for
6 Montgomery’s refusal to provide this information in discovery, as he was previously ordered to do. If
7 the evidence had actually been altered, then this fact would be highly relevant; and Montgomery
8 should be eager to produce the allegedly altered evidence in order to show eTreppid’s malfeasance.
9 The fact that Montgomery instead seeks to prevent disclosure of this evidence speaks volumes about
10 the complete lack of merit to his allegation that evidence was altered in any way.

11 **II. STATEMENT OF FACTS**

12 **A. Nature of Any Discrepancies Between the Returns and the Inventory**

13 Notably absent from Montgomery’s Motion is any discussion of the exact nature of the alleged
14 discrepancy between the Returns and the Inventory. Instead, Montgomery generally alleges that “the
15 return inventory lists reflect that the FBI returned significantly more documents and material than what
16 was originally seized.” A close comparison of the Returns and the Inventory shows that the difference
17 between what was seized and what was returned is really not as significant as Montgomery would have
18 this Court believe.

19 Montgomery has been ordered to provide eTreppid with the following items which were seized
20 during the FBI’s search of his home and storage units (1) photocopies of the faces of all CDs that were
21 seized, (2) full electronic copies of any CDs that were labeled in such a manner as to indicate
22 ownership by eTreppid, and (3) forensic copies of any hard drives for which eTreppid can establish
23 ownership. Accordingly, any discussion of the discrepancies between the Returns and the Inventory
24 will be limited to these items.

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CD's Seized compared to CDs Returned

The Returns¹ (**Exhibits A and B** to Montgomery's Motion) contain the following specifically identified entries showing that the FBI seized CDs or DVDs:

- "15 Compact Disks" (Doc. 15, Item 5).
- "16 Compact Disks" (Doc. 15, Item 13).
- "One Yellow/Grey Case Containing eTreppid Disks" (Doc. 17, item 1).
- "Seven Compact Disks" (Doc. 17, Item 2).
- "One box containing 78 compact disks" (Doc. 17, Item 11).
- "One compact disk labeled eTreppid. (Doc. 17, Item 14).

The Inventory (**Exhibit C** to Montgomery's Motion) contains the following specifically identified entries showing that the FBI returned CDs or DVDs:

- "One Yellow and Grey Case Containing eTreppid Disks – 51 CDs" (Item 9).
- "One DVD disk Etreppid 1 – Dennis, Warren, Gianna 7/11/02"
- "3 DVDs and 2 compact disks" (Item 12).
- "2 DVDs labeled 'Lance Output [illegible] eTreppid Eyes Only'" (Item 14).
- "Thirteen (13) Computer CDs" (Item 25).
- "Sixteen (16) Computer CDs (Item 26).
- "Three (3) Computer CDs" (Item 27).
- "Seventy-Eight (78) CDs.

It is obviously impossible to say to an absolute degree of certainty how many CDs were in the Yellow and Grey case at the time of the original search. However, there is no reason to believe that it did not contain 51 CDs at that time, just as it contained 51 CDs at the time the seized items were returned. Based on this assumption, the Returns list a total of 168 CDs and DVDs. The Inventory shows that the FBI returned a total of 169 CDs and DVDs. Clearly the slight discrepancy in the number of CDs and DVDs listed on the Returns and on the Inventory is not so significant as to demand

¹ There are two Returns at issue here, which are referred to by their filing number in the Buckthorne Lane Proceedings, Case No. 3:06-cv-00263-PMP-VPC, or Doc. No. 15 and Doc. No. 17.

any explanation other than the simple fact that the number of CDs was miscounted during the search. Montgomery's suggestion to the contrary is simply ludicrous.

Hard Drives Seized Compared to Hard Drives Returned

The Returns (**Exhibits A and B** to Montgomery's Motion) contain the following specifically identified entries showing that the FBI seized Hard Drives.

- "HP Pavilion DV 1000. . . Notebook" (Doc. 15, Item 1)
- "Western Digital Hard Disk" (Doc. 15, Item 10).
- "Granite Digital – "DEVSERVER" 12/17/2005" (Doc. 15, Item 11).
- "Granite Digital Server Labeled "DEO 01/20/06 Prog." (Doc 15 Item 15).
- "One IBM Travel Star Hard Drive." (Doc. 17 Item 7).
- "Eleven Sealed Western Digital Hard Drives." (Doc. 17 Item 8).
- "Ten Various Manufacture Hard Drives" (Doc. 17, Item 10).
- "One Removable Hard Drive Labeled 'Dennis Eyes Only.'" (Doc. 17, Item 14).

The Inventory (**Exhibit C** to Montgomery's Motion) contains the following specifically identified entries showing that the FBI returned Hard Drives:

- "Granite Digital DEVSERVER Labeled 12/17/05 . . . with two hard drives." (Item 3).
- "One Granite Digital Server labeled 1/20/06 Prog with two hard drives." (Item 4).
- "One Western Digital 300 GB. . . containing evidence from HP Pavillion Notebook 30 GB Hatachi Hard drive." (Item 5).
- "One Maxtor 300 GB Hard Drive. . . containing evidence derived from custom tower Western Digital 250 GB Hard drive." (Item 6).
- "Eleven sealed Western Digital Hard Drives." (Item 7).
- Item 8 is a list of ten specifically identified hard drives.
- "Western Digital 250 GB" (Item 10).
- One removable Western Digital 60 GB" (Item 11)

The Inventory shows that a total of 29 hard drives were returned to Montgomery. While the returns only specifically identify 24 hard drives which were seized, the also identify the "Granite Digital DEVSERVER," which, the Inventory shows, contains two hard drives; the "Granite Digital

1 Server labeled 1/20/06 Prog,” which contained two hard drives, and one hard drive containing
2 evidence derived from the HP laptop. Accordingly, it is clear that while not all the hard drives
3 specifically identified in the Inventory were specifically identified in the Returns, this is due to nothing
4 more sinister than the fact that a handful of the hard drives that were originally seized were not
5 specifically identified on the Returns because they were installed in servers at the time of seizure.
6 Only during the more meticulous process of preparing the Inventory did the FBI specifically identify
7 the hard drives installed in servers. The slight discrepancy between the Returns and the Inventory does
8 not suggest any improper activity on the part of the FBI, it merely shows that the Inventory was
9 prepared in more complete detail than the returns.

10 Accordingly, Montgomery’s suggestion that the “FBI returned significantly more documents
11 and material than what was originally seized” is simply not born out by the evidence.

12 **B. Montgomery’s Delay In Seeking the Requested Relief**

13 As set forth above, the evidence available in this matter shows that Montgomery claimed
14 concerns about any discrepancies between the Returns and the Inventory are not supported by the
15 evidence. The procedural history associated with this matter strongly suggests that Montgomery
16 himself recognizes the weakness of his position, and has filed the present motion for no purpose other
17 than to further delay compliance with this Court’s February 21, 2008 order.

18 All relevant portions of the Inventory were completed on March 29, 2007, and bear the
19 signature of Montgomery’s former counsel, Eric Pulver.² Thus, as of that date, Montgomery was
20 aware of the alleged discrepancies between the Returns and the Inventory.

21 eTreppid served its Second Set of Requests for Production on November 19, 2008. **Exhibit D**
22 to Montgomery’s Motion. In these requests, eTreppid asked that Montgomery provide for inspection,
23 or produce forensic copies of, “any electronic storage device, including any hard drive or disk. . . that
24 was seized by the FBI and returned to you . . .” *Id.*, Request No. 6. Montgomery provided his
25 responses to these requests on January 25, 2008. **Exhibit E** to Montgomery’s Motion. In these
26 responses, Montgomery did not raise any objection to eTreppid’s request based on the notion that
27

28 ² One page of the Inventory is dated April 7, 2007. However, this shows only the return of certain prescription drugs and is not relevant to the present motion.

1 Montgomery could not ascertain what was “seized” by the FBI because of an alleged discrepancy
2 between the Returns and the Inventory.

3 Montgomery refused to provide documents responsive to eTreppid’s Request No. 6, and
4 eTreppid was obliged to file a motion to compel on February 15, 2008. Docket No. 431. Pursuant to
5 this Court’s order, Montgomery filed a simultaneous brief regarding the dispute as to production of
6 documents. Docket No. 432. Although Montgomery’s brief included a specific discussion of
7 eTreppid’s Request No. 6, Montgomery did not, at that time, raise any concern with a discrepancy
8 between the Inventory and the Returns.

9 On February 21, 2008, after a hearing lasting nearly all day, this Court issued an Order (Docket
10 448) which required Montgomery to (1) provide eTreppid with photocopies of the faces of all CDs
11 seized in the FBI search and returned to Montgomery, (2) provide eTreppid with actual copies of all
12 those CDs which bore a label indicating ownership by eTreppid, and (3) produce a forensic copy of
13 those hard drives for which eTreppid had provided records indicating ownership. Pursuant to the
14 February 21 Order, Montgomery was required to provide the subject documents on or before March
15 14, 2008.

16 On March 7, 2008, Montgomery filed his Objection to the Magistrate’s February 21, 2008
17 order and a Request for Reconsideration of the same. Docket No. 460. In this Objection, Montgomery
18 argued at some length that he should not be obliged to provide copies of the subject CDs. Docket No.
19 460, 13:11 to 16:14. However, at no point did Montgomery assert that he should be relieved of his
20 obligation to produce the subject documents by virtue of any alleged discrepancies between the
21 Inventory and the Returns.

22 On March 19, 2008, this Court Denied Montgomery’s objections (Docket 480) and upheld the
23 February 21, 2008 order requiring production of the subject documents and CDs by March 14, 2008.
24 Nonetheless, Montgomery has still not produced these items, and on April 7, 2008 – more than one
25 year after the Inventory was prepared, Montgomery first asserted that that he should not be obliged to
26 provide the CDs and hard drives that are the subject of this Court’s February 21, 2008 order because of
27 an alleged discrepancy between the Inventory and the Returns.

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1 **III. ARGUMENT**

2 **A. Montgomery's Request for a Protective Order Should Be Denied as Untimely**

3 As set forth above, Montgomery has been aware of the basis for his present request for a
4 protective order since March 29, 2007. Nonetheless, Montgomery did not assert this objection in his
5 original responses to eTreppid's requests for production, he did not assert this objection in his
6 opposition to eTreppid's motion to compel, and he did not assert this argument in his objection to the
7 Court's February 21, 2008 Order. By failing to assert this argument for weeks and months, especially
8 in light of the fact that the discovery deadline is rapidly approaching and the Montgomery was ordered
9 to provide the subject documents weeks ago, Montgomery has waived his right to seek the present
10 protective order. *Drutis v. Rand McNally & Co.*, 236 F.R.D. 325 (E.D.Ky. 2006).

11 **B. Montgomery Has Not Shown Any Need for a Protective Order**

12 In addition, Montgomery has not shown good cause to support a protective order. Montgomery
13 asserts that good cause exists because "The FBI's inventories are facially incompatible – particularly
14 given that the inventories of 'returned' items is [sic] substantially broader than the inventory of that
15 which was seized." Motion at 10:4-6.

16 As set forth above, there is simply no substance to Montgomery's allegation. Montgomery
17 seeks a protective order to prevent him from providing certain CDs and Hard Drives. The Returns
18 show that the government seized 168 CDs and DVDs, and returned 169 CDs and DVDs. This
19 difference of one CD is hardly so substantial as to warrant the suspicion that the evidence was altered
20 while in the custody of the FBI. Likewise, any "discrepancy" between the Returns and the Inventory
21 with respect to the hard drives seized is clearly explained by the fact that the Inventories specifically
22 identify hard drives that were installed in servers and therefore not individually inventoried at the time
23 the Returns were created. Accordingly, Montgomery has not presented evidence to this Court to show
24 that the FBI returned more evidence than it originally seized.

25 Moreover, even if this Court were to accept Montgomery's conspiracy theory as having some
26 basis in reality, Montgomery would not be entitled to a protective order. If, as Montgomery alleges,
27 eTreppid managed to persuade an FBI agent to plant evidence, then surely the allegedly planted
28 evidence would be highly relevant in this matter. Because it would be in Montgomery's interest to

1 produce any evidence that the items in the FBI's possession were tampered with, he is not entitled to a
2 protective order relieving him of the obligation to provide this evidence.

3 Indeed, if Montgomery had some basis to believe that evidence was planted, then he would
4 have the obligation of producing this evidence. In fact, even though the allegedly planted evidence has
5 been in Montgomery's possession ever since the items seized by the FBI were returned to
6 Montgomery in March 2007, Montgomery has produced no real evidence which supports the
7 allegations of the present motion. This fact alone demonstrates the frivolous and bad faith nature of
8 the present motion for a protective order. Accordingly, eTreppid respectfully submits that no good
9 cause exists to support Montgomery's motion for a protective order.

10 **IV. CONCLUSION**

11 For the foregoing reasons, eTreppid respectfully requests that Montgomery's Motion for a
12 Protective Order be Denied. eTreppid does not object to the requested evidentiary hearing.

13 Dated: April 25, 2008.

14 /s/

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PROOF OF SERVICE

I, Cynthia L. Kelb, declare:

I am employed in the **City of Reno, County of Washoe, State of Nevada**, by the law offices of Hale Lane Peek Dennison and Howard. My business address is: **5441 Kietzke Lane, Second Floor, Reno, Nevada 89511**. I am over the age of 18 years and not a party to this action. I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection of mail, delivery of its hand-deliveries and their process of faxes.

On April 25, 2008, I caused the foregoing **ETREPPID TECHNOLOGIES, L.L.C. AND WARREN TREPP'S OPPOSITION TO THE MONTGOMERY PARTIES' MOTION FOR AN EVIDENTIARY HEARING AND MOTION FOR A PROTECTIVE ORDER PENDING THE HOLDING OF AN EVIDENTIARY HEARING** to be:

X filed electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document to the following person(s) at the following e-mail addresses:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on April 25, 2008.

_____/s/_____
Cynthia L. Kelb

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